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No. _____

In the Supreme Court of the United States

October Term, 1981

RONALD EDWARD SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A WARRANT WAS REQUIRED TO SEARCH AN AIRCRAFT THAT HAD LANDED ON PRIVATE PROPERTY, WHERE THE AIRCRAFT WAS UNOCCUPIED AT THE TIME POLICE ARRIVED AND WAS IMMOBILIZED BY A CONTINGENT OF POLICE WHERE THERE WAS NO DANGER OF IT BEING ENTERED OR MOVED.

II. WHETHER EVIDENCE FROM A VEHICLE LOCATED THROUGH THE FRUITS OF PETITIONER'S ILLEGAL ARREST, WHERE THE VEHICLE WAS SEIZED WITHOUT PROBABLE CAUSE BUT NOT SEARCHED UNTIL THE FOLLOWING DAY WHEN PROBABLE CAUSE AROSE, COULD BE RECEIVED IN EVIDENCE.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Ronald Edward Smith, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on February 19, 1982.

OPINION BELOW

The opinion of the Court of Appeals, which is unpublished, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Middle District of Alabama.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 19, 1982, affirming petitioner's conviction of February 13, 1981. The Court of Appeals denied a timely petition for rehearing on March 25, 1982. On May 18, 1982, Justice Powell signed an order extending the time for filing this petition for certiorari to and including June 9, 1982. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

LIST OF ALL PARTIES IN THE COURT BELOW WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In addition to the petitioner, the following, who are not named in the style of this case, were named defendants in the United States District Court for the Middle District of Alabama, the court of first instance.

Julius Cecil Olson
Dan Fowler
William Larry David
Samuel Mark Wylie, III

QUESTIONS PRESENTED FOR REVIEW

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CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner RONALD EDWARD SMITH was convicted of conspiracy to import marijuana (21 U.S.C. §963); importation of marijuana (21 U.S.C. §§952(a) and 960(a)(1)); conspiracy to possess marijuana with intent to distribute (21 U.S.C. §846); and possession of marijuana with intent to distribute (21 U.S.C. §841(a)(1)).

According to the government's theory of the case, in August-September 1979, co-defendant Dan Fowler suggested to co-defendant (and government witness) Samuel Mark Wylie, III, that Wylie could make some easy money by locating airstrips "to bring in marijuana." Fowler subsequently introduced Wylie to Stephens, a pilot, and Wylie showed them two airstrips in the Opelika, Alabama, area.

Around April 1980 an agreement was

reached between Wylie and Stephens whereby Wylie was to receive $1,000.00 each time a marijuana plane landed. Several discussions followed until the plans were frustrated by Stephens' untimely death in July 1980. Fowler then introduced the petitioner and his co-defendants (Olson and David), who were in no way related to the original conspiracy, to Wylie in late September 1980.

Subsequently, during the afternoon hours of October 15, 1980, Brenda Huey observed a twin engine airplane, of which petitioner was co-pilot, land on the Huey's private airstrip adjacent to her home[1] and taxi off the airstrip out of sight to the vicinity of the Huey hangar. Mrs. Huey peered around the

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[1] Contrary to the finding by the Court of Appeals (App. 13), the farm was not in a remote area (TR 69-70); G.Ex. 14).

hangar and observed two men off-loading small cardboard boxes from the plane onto a pickup truck, one man urging the other to hurry. The plane's engines were shut down.

Concerned, Mrs. Huey phoned her husband's business partner, Mr. Wilson, who summoned the police, then drove to the Huey farm. En route, Wilson observed co-defendant Olson seated alone in an Oldsmobile in the parking lot of Bishop's grocery store near the Huey place. Because he felt Olson eyed him suspiciously, Wilson recorded his license tag number. Just before reaching the farm, Wilson met Wylie (a Huey-Wilson employee) with two passengers in the company pickup truck whom Wylie identified as friends who had just landed a plane at the Huey's farm (with permission previously obtained from Mr. Huey by Wylie). After meeting Wylie,

Wilson continued on to the Huey farm and, upon arrival, notified the police to disregard his call.

Shortly after Wilson arrived at the Huey farm, Wylie returned with only one passenger, Olson, whom Wilson had seen in the Oldsmobile at Bishop's store. Wylie told Huey and Wilson that he had just picked up Olson at the Mariner Inn, which Wilson did not believe. Wylie and Olson then drove to the airplane.

Shortly, Officer Sumners of the Opelika Police Department arrived and, according to his testimony, was advised by Mrs. Huey that she had observed four men (Mrs. Huey claims she only saw two men (TR 93)) unloading boxes from a twin engine plane onto a truck. Sumners phoned for help, then drove to the plane where he took Olson and Wylie, who were standing near the plane, into custody and

observed there were no persons on board the aircraft. He noted that there were three seats from the aircraft on the ground. Within minutes, two more officers and three detectives arrived, one of whom was ordered to "not to let anybody on the plane" until the other returned from interviewing Mrs. Huey and Mr. Wilson.

In the meantime, numerous other officers (estimated by one witness to be anywhere from 15 to 40 officers) had arrived at the plane.

In speaking with police, Olson mentioned repossessing the airplane but refused to elaborate when questioned further. A detective observed what he believed to be marijuana on the top step of the airplane. He then entered the plane and found marijuana residue on the carpet. The keys to the plane were recovered by police when found partially

covered with dirt near Olson's feet, some twenty feet from the plane. In their testimony, the officers conceded that the area was secure and that nothing prevented them from applying for a warrant to any of several admittedly readily available judicial officers.

The craft was flown that evening from the Huey airstrip to the Auburn-Opelika Airport where it was searched and processed for fingerprints and marijuana residue (less than .007 ounces being found in the search of the aircraft and the automobile, infra). During the earlier search, petitioner's denture, as well as other crucial items of evidence linking him to the plane and the charged offenses, were recovered from the cockpit and passenger area.

While the police were at the Auburn-Opelika Airport searching the plane, a

charter pilot became suspicious of two men (petitioner Smith and co-defendant David) desiring to hire him to fly co-defendant David tc Georgia. Learning of this, the police arrested the men and searched petitioner, finding keys to the Oldsmobile. Based upon the keys (which the trial court correctly suppressed as fruit of an illegal arrest), the police searched for and located the Oldsmobile at the airport, seizing and towing it to a security area at the jail, but not searching it until the following day when probable cause arose based upon the post-seizure, late evening confession of co-defendant Wylie.

During the search of the Oldsmobile, evidence crucial to linking petitioner to the automobile, the aircraft and the charges was recovered from the automobile.

Following his arrest, petitioner was

held incommunicado until the following afternoon, being denied a bond hearing, telephone calls or other outside contacts.

BASIS OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction of the United States District Court for the Middle District of Alabama was invoked under the provisions of Title 18, United States Code, Section 3231.

REASONS FOR GRANTING THE WRIT

I. THE DECISION TO ADMIT EVIDENCE RECOVERED FROM THE UNOCCUPIED AIRCRAFT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT AS TO THE PROPER APPLICATION OF COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971), AND ITS PROGENY.

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures (applicable to the states through the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963)), this Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made, recognizing that the warrant requirement is a valuable

and cherished protection against unreasonable intrusion. Chambers v. Maroney, 399 U.S. 42 (1970). Only in exigent circumstances will the judgment of police as to probable cause serve as sufficient authorization to search.

Carroll v. United States, 267 U.S. 132 (1925), holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway. The rationale for the exception is that the car is movable, the occupants are alerted, and the car may be taken from the jurisdiction and never found again or the instruments or fruits of a crime may be removed if a warrant must be obtained. In Carroll, the car's occupants had not been arrested and the distance involved to procure a magistrate's signature on a warrant was significant so the likelihood of removal of the vehicle was

very real.

In Coolidge v. New Hampshire, 402 U.S. 443 (1971), following petitioner's arrest, his automobile, which had been parked in his driveway, "plainly visible from the street" (at 448), was towed to the station-house and searched without a warrant. Petitioner's claim here, analogous to that raised in Coolidge, is that the seizure and subsequent search of the aircraft (which has been equated in judicial decisions with an automobile for purposes of searches and seizures, United States v. Sigal, 500 F.2d 1118, 1121-23 (10th Cir.), cert. denied, 419 U.S. 954 (1974)), under circumstances akin to those in Coolidge, was invalid because such search was conducted without a warrant.

The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval

by judge or magistrate, are per se, unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). The exceptions to the rule that a search must rest upon a search warrant are "jealously and carefully drawn" (Jones v. United States, 357 U.S. 493, 499 (1958)), and there must be "a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 456 (1948). "[T]he burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1951). Such exceptions to the warrant requirement must be cautiously guarded to insure the right of personal security against arbitrary intrusions by official power. In

so doing, the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. Johnson v. United States, 333 U.S. 10 (1948).

The first arguable justification for seizing and searching petitioner's aircraft when two co-defendants were arrested at the landing strip was that the seizure and search were incident to the arrests. Under Chimel v. California, 395 U.S. 752 (1969), the lawful arrest of these suspects outside the aircraft could never by itself justify a warrantless search inside the plane. This result is not changed by the decision in New York v. Belton, 453 U.S. 454 (1981), under the facts of this case. Search-incident

doctrine has no applicability to this case.

The second arguable justification for the warrantless seizure and subsequent search of petitioner's aircraft is that under Carroll v. United States, 267 U.S. 132 (19-25), the police may make a warrantless search of an automobile whenever they have probable cause to do so, and, by analogy, of an aircraft because its mobility makes it likewise easily removable.

But even granting that the police had probable cause to search the plane, the application of the Carroll case to these facts, as stated in Coolidge v. New Hampshire, 403 U.S. 443 (1971), "would extend it far beyond its original rationale."

The application of the Carroll doctrine, as characterized in Chambers, to unoccupied, parked cars, has been particularly troublesome

for this Court. The plurality in Coolidge struck down the search of an unoccupied car parked on private property, and appeared to restrict its predecessor, Chambers, to searches preceded by a valid Carroll stop, i.e., to vehicles stopped while moving on the open highway. Another plurality opinion, however, relied directly on Chambers to uphold the warrantless seizure of an unoccupied car parked in a public parking lot, and refused to attach any significance to the lack of a prior Carroll stop. See Cardwell v. Lewis, 417 U.S. 583, 594 (1974):

> The fact that the car in Chambers was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance.

This plurality opinion stated that Coolidge was distinguishable from Chambers because

Coolidge involved entry on private property (a driveway), whereas in Chambers "the automobile was seized from a public place where access was not meaningfully restricted." 417 U.S. at 593.

The Cardwell plurality also claims that this was the ground on which Coolidge plurality distinguished Chambers, a statement hard to reconcile with footnote 20 of Coolidge read in full.[2] Chambers is of no help to the State since that case held only that, where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station.

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[2] Part III-B of the concurring and dissenting opinion of Mr. Justice Black argues with vehemence that this case must somehow be controlled by Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, yet the precise applicability of Chambers is never made clear. On its face, Chambers purports to deal only with situations in which the police may legitimately make a warrantless search under Carroll

(footnote continued on following page)

It is noted that all of the Justices comprising the Coolidge plurality dissented in Cardwell. The emphasis in footnote 20 seems to be on the initial Carroll stop in Chambers,

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(footnote continued from preceding page) v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543. Since the Carroll rule does not apply in the circumstances of this case, the police could not have searched the car without a warrant when they arrested Coolidge. Thus Mr. Justice Black's argument must be that Chambers somehow operated sub silentio to extend the basic doctrine of Carroll. It is true that the actual search of the automobile in Chambers was made at the police station many hours after the car had been stopped on the highway, when the car was no longer movable, any "exigent circumstances" had passed, and, for all the record shows, there was a magistrate easily available. Nonetheless, the analogy to this case is misleading. The rationale of Chambers is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of whether the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. That the police may have been legally on the property in order to arrest Coolidge is, of course, immaterial, since, as shown in II-A of the text, supra, that purpose could not authorize search of the car even under United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653.

contrasted with the fact that the car in Coolidge was parked and unoccupied. While the location of the car on private property is set forth as a fact in the case, Coolidge does not, at least overtly, identify this as a fact of crucial legal importance.

The Supreme Court's more recent per curiam in Texas v. White, 423 U.S. 67 (1975), did not effect this needed reconciliation of Coolidge and Cardwell. Texas v. White reiterates and extends the ruling of Chambers, that if an immediate search of the scene is permissible, a later search at the stationhouse can be made without a warrant. Since the case involved a moving car that had been stopped, all the Justices began with the premise that an immediate search at the scene would have been permissible; their focus was on the validity of the stationhouse search.

This is made clear by the majority's reference to the following language in Chambers:

> On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for the search. The probable-cause factor still obtained at the stationhouse and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. 399 U.S. at 52 (emphasis supplied).

The underlying reasoning of Carroll and subsequent cases following it is that there is . . .

> a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality

> or jurisdiction in which the warrant must be sought. 267 U.S. at 153. (Emphasis supplied)

It is frequently said that automobiles may be searched without a warrant merely because they are "mobile" or "movable". No constitutional significance should attach to this type of mobility inasmuch as a good number of containers that the police might discover on a person's property and want to search are equally movable. The word "automobile" (or "airplane") is not a talisman in whose presence the Fourth Amendment fades away and disappears.

Here, unlike Carroll where the opportunity to search was fleeting, the aircraft was shut down on a private airstrip, surrounded by fifteen to forty police officers, with all co-defendants who reasonably had

access to the plane taken immediately into custody, all prior to the plane being searched. It was then flown to a commercial airport and safely ensconced in a hangar, under police control, where it was more thoroughly searched. The opportunity for search was thus hardly "fleeting". There was no way anyone other than law enforcement officers officially engaged in the investigation of the case could conceivably have gained access to the aircraft once police had arrived on the scene.

The very term "exigency" commands that analysis be shaped by the realities of the situation. The plurality in Coolidge rejected speculative, far-fetched exigencies based on potential mobility:

> In this case, it is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plain-clothesmen,

> and the Coolidge property was under the guard of two other officers, the automobile was in a literal sense "mobile." A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility. 403 U.S. at 461 n.18.
>
> Mobility potential, however, can spawn an exigent situation if the police have insufficient manpower to post a guard as an assurance of continued immobilization. See United States v. Free, 437 F.2d 631, 635 (D.C. Cir. 1970). However, here the record reveals a surfeit, not a shortage, of police officers involved in the investigation.

Additionally, here it is uncontested that numerous, specifically identified judicial officers were available to consider the merits of issuing a search warrant. (Supp.H. 66).

In sum, by no possible stretch of the imagination can this be made into a case where "it is not practicable to secure a warrant." Carroll, supra, at 153.

Since Carroll would not have justified,

and Coolidge would have prohibited, the warrantless search of the aircraft at the time it was first seized on the private strip, the later search at the airport hangar was plainly illegal, as no exigent circumstances that would have justified the police in proceeding without a warrant existed in either instance.

For the automobile (or "mobile aircraft") exception to apply, the government must show that at the time of the warrantless seizure and search the officers had reason to believe that the mobility or exposure of the plane made it impracticable to seek a warrant. Warden v. Hayden, 387 U.S. 294 (1967). This it cannot do.

CONFLICT AMONG CIRCUITS

In United States v. Payne, 429 F.2d 169

(9th Cir. 1970), two couples were camping in an individually allotted campsite in Yosemite National Park. During the evening, an off-duty policeman camping with his family in an adjoining site observed the two couples smoking a substance he believed to be marijuana and also observed them making what he thought were "furtive" movements to remove objects he thought to be drugs from the glove compartment of a car parked nearby. He summoned a park ranger, and the two entered the campsite. They found that one of the couples was preparing to bed down for the night, while the couple to whom the car belonged was visiting in another campsite. The officers searched the unoccupied parked automobile, found 12 seconal capsules, and arrested the couple who had stayed behind. The government attempted to uphold the search

under Carroll, supra. The Court of Appeals answered (at 171-172):

> While it is true that the Supreme Court has enunciated slightly different rules concerning a search of an automobile without a warrant, the rationale is apparently based upon the fact that a "vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Chimel v. California, 395 U.S. 752, 764 . . . . In the instant case the search of the Volkswagen cannot be justified upon this reasoning. There is no indication in the record that the appellant or any of his party were preparing to leave, and quite to the contrary it is clear that appellant was bedding down for the evening and that there was ample time to secure the necessary warrant for a search of the car had Ranger Wolfe believed there was probable cause to seek one.

See also United States v. Williams, 630 F.2d 1322 (9th Cir.), reh. denied, cert. denied, 449 U.S. 865 (1980).

And, in United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978), petition for re-

hearing en banc denied, 590 F.2d 786 (1979), marijuana was taken from a boat and, while under surveillance by government agents, loaded onto four trucks, two of which were driven to the Motel One in Atlanta under constant surveillance. The other two trucks were seized in Savannah and found to contain bales of marijuana. Shortly thereafter, as drivers of the Atlanta trucks left the Motel One, they turned and waved at the surveilling agents. Because of this believed-to-be gesture of recognition, the drivers were arrested. Learning of the discovery in the Savannah trucks, the agents seized and opened the two trucks in Atlanta and verified that they contained marijuana. The government again attempted to uphold the search and seizure under Carroll, supra. The Court of Appeals answered (at 342):

> Such exigency did not exist in the case at hand. With numerous officers around the premises and the two drivers in custody, there was no threat that the trucks were likely to be moved or their contents lost.

The Court further stated (at 343) that "This Circuit has recognized that Chambers [Chambers v. Maroney, 399 U.S. 42 (1970)] is limited to highway stops. See United States v. Chapman, 5 Cir., 1973, 474 F.2d 300; United States v. Ragsdale, 5 Cir., 1972, 470 F.2d 24."

And, in United States v. Kelly, 547 F. 2d 82 (8th Cir.), reh. denied (1977), that Circuit held (at 84):

> No exigent circumstances were present here. Kelly was arrested inside his motel room and immediately placed in handcuffs. The car was unoccupied and parked on private property. There was no showing that a friend or confederate existed to whom the location

of the car could be reported and who would be able to remove the car. Absent exigent circumstances, a warrant is required.

In footnote 5, the Court went on to state:

The fact that the car was parked outside his motel room is hardly distinguishable from the facts of Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In that case, the Supreme Court held invalid the search of the defendant's car which had been parked in the driveway of his home. The Court stated:

> [I]t seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. Coolidge v. New Hampshire, supra at 463, n.20, 91 S.Ct. at 2036.

We do not find Cardwell v. Lewis, 417 L.Ed.2d 325 (1974), which upheld a less intrusive search of a car exterior after the car had been seized from a public parking lot, to be to the contrary.

In so holding, the Fifth, Eighth and Ninth Circuits' interpretations of the need for a search warrant where an otherwise "mobile" vehicle is unoccupied, under the complete control of police authorities, and not susceptible, under any view of the circumstances, to being entered or moved, are in conflict with the holding of the Eleventh Circuit in the present case that "it was impracticable to obtain a warrant since the craft could have been quickly moved out of the area" (App. 12), which also conflicts with the holding of Coolidge v. New Hampshire, supra, inasmuch as the existence of probable cause must be accompanied by factors rendering the warrant procedure impracticable. Warden v. Hayden, supra. Such circumstances were absent here.

If the decision herein is permitted to

stand, the Eleventh Circuit will establish a precedent that the mere inherent mobility of automobiles and aircraft, in and of itself, without more, constitutes an "exigent circumstance" dispensing with the warrant requirement.

This case offers the Court an opportunity to clarify the law in the area of automobile/aircraft searches, which "branch of the law is something less than a seamless web" (Cady v. Dombrowski, 413 U.S. 433, 440 (1973)), subverting esteemed Fourth Amendment protections in an attempt by various courts, including the Court of Appeals in this case, "to reach what are perceived as the correct results in specific cases." Rakas v. Illinois, 439 U.S. 128, 156 (1978).

II. THE TRIAL COURT ERRED IN APPLYING THE INDEPENDENT SOURCE/INEVITABLE DISCOVERY EXCEPTIONS TO THE "FRUIT OF THE POISONOUS TREE" DOCTRINE, THEREBY PERMITTING INTRODUCTION OF EVIDENCE SEIZED FROM PETITIONER'S AUTOMOBILE WITHOUT PROBABLE CAUSE.

A.

BACKGROUND

From the record in this case it cannot be disputed but that petitioner Smith was illegally arrested on the evening of October 15, 1980, at the Auburn-Opelika Airport. The trial court, after conducting hearings into the facts and circumstances of the arrest, suppressed all evidence resulting therefrom (R. 136). Cf. Weeks v. United States, 232 U.S. 383 (1914); Delaware v. Prouse, 440 U.S. 648 (1979); Wong Sun v. United States, 371 U.S. 471 (1963).

At the time of the illegal arrest, pe-

titioner was searched, resulting in the recovery of the keys to his 1972 Oldsmobile and his contemporaneous statement that he had driven the car to the airport. Armed with this information, the officers began a search of the airport parking lot where they found the Oldsmobile and confirmed its identity as the one suspected by inserting the key and testing the door lock. The vehicle was then towed to the police station where it was searched the following afternoon, once probable cause developed from a co-defendant's post-seizure confession. From the search, crucial evidence was recovered and admitted against petitioner during trial.

B.

ABSENCE OF PROBABLE CAUSE

Prior to the illegal arrest of petitioner and the seizure of his keys, the in-

formation possessed by police was essentially that Mr. Wilson had observed an Oldsmobile (the license number of which he gave to the police) containing a suspicious-looking male in the parking lot of Bishop's Store, along with several other automobiles (T. 121, 154, 155), in the vicinity of the Huey place; that two unidentified men who were seen unloading the aircraft which was observed to have a minute amount of suspected marijuana on its stair were unaccounted for; and, after locating the Oldsmobile following the illegal seizure of petitioner's keys, the officers observed a radio, the top to a radio, boots, a briefcase, several glasses and some beer cans in the vehicle.

Although this issue (i.e., the absence of probable cause) was raised in the Court of Appeals, it was completely ignored in that

Court's lengthy opinion.

The test to be applied before seizing an automobile and searching it for its contents is whether there was a "substantial basis" at the time the vehicle was seized (as opposed to a later time when probable cause did arise following the interrogation of co-defendant Wylie) to believe that it contained contraband, evidence, or fruits or instrumentalities of a crime. Aguilar v. Texas, 378 U.S. at 111 (1964). Here, at the time of the seizure, such basis did not exist; the mere fact that evidence was recovered as a result of a search based upon nothing more than suspicion can in no way justify the search. Wong Sun v. United States, supra.

C.

INDEPENDENT SOURCE
AND
INEVITABLE DISCOVERY

Petitioner next submits that irrespective of the existence of probable cause, the police officers' discovery of his Oldsmobile in the airport parking lot was a fruit of his illegal arrest wherein the officers recovered his vehicle keys which led them to search for, locate and seize the automobile at the airport.

In order to uphold the seizure and subsequent search, the Court of Appeals erroneously relied first upon the doctrine of independent source, asserting that the police had information independent of the unlawful arrest that led to the discovery of the Oldsmobile. Such a finding is simply unsupported by the record. While the police had a description of the automobile from an independent source, they had no information to lead them to the <u>whereabouts</u> of the Oldsmobile un-

til they illegally arrested petitioner and from him gained evidence and information that led to the location of the vehicle. The "independent source" which is referred to at best only supports an inference that the automobile might eventually have been located.

To circumvent the absence of support in the record for reliance upon the independent source theory, the Court of Appeals went further, holding that the police "would inevitably" have discovered the Oldsmobile which "inevitability" supposedly overcame the taint resulting from the illegal search of petitioner and discovery of his keys. (App. 17).

This seldom used concept of "inevitable discovery" first appeared in Somer v. United States, 138 F.2d 790 (2nd Cir. 1943), and has followed a rocky course ever since.

Although this Court has never clearly accepted the inevitable discovery concept as a rule of law, an invitation for its consideration was extended in Brewer v. Williams, 430 U.S. 387, 406 (1977), where this Court suggested (at n.12):

> While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. Cf. Killough v. United States, 119 U.S. App. D.C. 10, 336 F.2d 929. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.

The present case presents a scenario wherein the evidence (not the automobile itself, but those items that were discovered

inside the automobile) would not have been available to the police had they not illegally arrested the petitioner and his companion and seized his vehicle which was held until the following day when sufficient probable cause arose for the issuance of a warrant. There is no showing in the record, nor logically could there be, that the automobile's contents would have been available for lawful seizure at the time probable cause eventually arose had petitioner not been arrested and held incommunicado until the following afternoon.

By ignoring these realities, the Court of Appeals has permitted the officers to accomplish by illegal means that which they could not do within the bounds of the Fourth Amendment. The Court of Appeals, perhaps realizing that the inevitable discovery doc-

trine, if it be such, hung by a very tenuous thread under the facts of this case, applied what had to be, at best, a "mere possibility" test in order to reach the conclusion that the evidence from the automobile "would have inevitably" been discovered. (App. 17).

The objection to even the existence of the inevitable discovery rule is that it is, in most instances, based upon conjecture, "results in a speculative theory with no discernible limits" (Comment, 31 U.Miami L.Rev. 615, 627 (1977)), and can only encourage police shortcuts whenever evidence may be more readily obtained by illegal than by legal means (Note 74, Colum.L.Rev. 88, 99 (1974)), and thus collides and is completely at odds with the fundamental purpose of the exclusionary rule. If the police will only be deprived

of that evidence which the defendant can show they would not have been able to obtain had they not engaged in the illegality, they will in no way be deterred from such conduct; all they will stand to lose is what they would not have otherwise had and they might gain some advantage if something slips by. Moreover, the illegal route is often faster and easier than the legally required route.

While the inevitable discovery exception to the taint doctrine may have some viability in limited cases, for example, where the police can show that the evidence would continue to exist and, therefore, be subject to seizure once their investigation "inevitably" led them to it (People v. Payton, 380 N.E.2d 224 (C.A.N.Y. 1978), rev'd on other grounds, Payton v. New York, 445 U.S. 573 (1980) [records reflecting purchaser of firearm required

by law to be maintained by vendor and, therefore, not subject to destruction by suspect]; United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980)[records of tickets maintained by travel agent and, therefore, not subject to destruction by suspect]), or where it can be shown that a law enforcement agency would have acquired information through required statutory procedures (People v. Soto, 285 N.Y.S.2d 166 (Sup. Ct. Queens County 1967) [where suspect confessed to a fatal stabbing after inadequate Miranda warnings and admitted placing knife in mailbox near scene of crime, it was held that the murder weapon could be introduced against him at trial because, under postal regulations, a foreign object must be turned over to the police when found in a mailbox. The Court was satisfied that the only effect of defendant's state-

ments was to accelerate the discovery of the evidence]), it has no applicability here where, realistically, had petitioner not been unlawfully arrested, his questioning by police would have alerted him to conceal what the police found in his vehicle.

Regarding application of the rule once it is found to exist, the majority of the courts that have utilized the exception have tended to define the necessary probability in terms of "would" (but cf. People v. Payton, supra, where "very high degree of probability" test used), and that requirement must be strictly adhered to. See, e.g., United States ex rel Owens v. Twomey, 508 F. 2d 858 (7th Cir. 1974); United States v. Falley, 489 F.2d 33 (2nd Cir. 1973); Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964).

The significance of the word "would"

cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it would have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that it has not benefited by the illegal acts of its agents; a showing that it might not have so benefited is insufficient. But this requires somewhat greater care than the Court of Appeals here has taken. In carving out the "inevitable discovery" exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe. For one thing,

it is essential that the courts not lose sight of the fact that a mechanical application of the inevitable discovery doctrine will encourage unconstitutional shortcuts. Note, 5 Hofstra L.Rev. 137, 159 (1977).

D.

CONFLICT AMONG CIRCUITS

The Fifth Circuit previously rejected the "inevitable discovery" theory saying, in United States v. Villarreal, 565 F.2d 932, 942 (5th Cir.), reh. & reh. en banc denied, cert. denied, 439 U.S. 824 (1978):

> We rejected the inevitable discovery rule because it requires speculation by the Court as to what would have happened had the illegality not occurred.

And, stating in United States v. Castellana,

488 F.2d 65, 68 (5th Cir.) rev'd on other grounds, 500 F.2d 325 (5th Cir. 1974)(en banc):

> To admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct.

That Circuit has recently produced two panel decisions accepting the inevitable discovery rule but applying a "reasonable probability" of inevitable discovery standard. United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980); United States v. Miller, 666 F.2d 991 (5th Cir. 1982).

The Ninth Circuit, in United States v. Wiga, 662 F.2d 1325, 1333 n.9 (9th Cir. 1981), has affirmed the "would have" standard.

The Seventh Circuit, in United States ex rel Owens v. Twomey, supra, likewise applied

a "would have" test to the inevitable discovery doctrine.

The First Circuit, in United States v. Bienvenue, supra, likewise applied the "would have" test, finding that agents would have located certain illegally seized evidence while executing a subsequently validly obtained search warrant.

The Eleventh Circuit, in formulating its version of the inevitable discovery doctrine in this case, has simply applied the meat axe and created a "possibility that the evidence would inevitably have been discovered" test.

There is simply no showing, nor can there be, that, absent the primary illegality of petitioner's arrest, the critical evidence seized from the car itself would have ultimately been found and seized. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392

(1920).

It is oft forgotten that the concept of exceptions to the taint rule were given birth in Wong Sun, supra, where this Court was careful to limit the material application of those doctrines:

> In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person ... this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. Weeks v. United States, 232 U.S. 383. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. Silverthorne Lumber Co. v. United States, 251 U.S. 385. Mr. Justice Holmes, speaking for the Court in that case, in holding that the Government might not make use of information obtained during an unlawful search to subpoena from the victims the very documents illegally viewed, expressed succinctly the policy of the broad exclusionary rule:
>
> "The essence of a provision forbidding the acquisition of evidence

> in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." 251 U.S. at 392.

It is submitted that the Court of Appeals here cast aside the teachings of Weeks, supra, and its progeny in reaching its decision in this case. It is suggested that this Honorable Court should definitively take a position on the existence or non-existence of the inevitable discovery doctrine and, if it be found viable, then set forth the standards to be followed by all courts in assessing inevitability.

Petitioner incorporates herein his argument appearing under Reason I above as such argument would apply to the seizure of the automobile herein, which occurred absent any exigent circumstances. The evidence clearly shows that all suspects were in custody, the vehicle was under the total dominion and control of the arresting officers and there was no possibility, let along any likelihood, that the vehicle could or would have been moved or tampered with prior to the obtaining of a search warrant. United States v. Kelly, supra.

CONCLUSION

In conclusion, petitioner requests the Supreme Court issue its Writ of Certiorari to the Court of Appeals for the Eleventh Circuit to review the issues presented in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7148
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIUS CECIL OLSON,
RONALD EDWARD SMITH,
WILLIAM LARRY DAVID,
DAN FOWLER,

Defendants-Appellants.

Appeal from the United States District Court
for the
Middle District of Alabama

(February 19, 1982)

Before HILL, VANCE and HATCHETT,
Circuit Judges.

PER CURIAM:

This appeal requires the review of the trial court's application of fourth amendment warrant requirement principles, the sufficiency of the indictment, the admissibility of co-conspirator hearsay testimony, interim jury service procedures, the propriety of judicial and prosecutorial conduct, the tardy production of Brady materials, the admission of certain rebuttal testimony, the adequacy of supplemental jury instructions, and the sufficieny of the evidence. We affirm.

FACTS

In late 1979, Dan Fowler invited Sam Wylie to locate airstrips to facilitate a marijuana smuggling operation in exchange for "some easy money." Fowler subsequently in-

troduced Wylie to James Stephens, a pilot, and Wylie showed them various airstrips in the Opelika, Alabama area. In April 1980, Fowler, Wylie, and another person consummated a deal wherein Wylie was to receive $1,000 for each load of marijuana successfully flown in. According to Wylie, who testified as a government witness, he and Fowler had numerous discussions about the venture and several airplanes were flown into different airstrips. The plan to utilize Stephens as a pilot was frustrated when he died in a July, 1980, air crash. Fowler then introduced the other defendants -- Julius Olson, William David, and Ronald Smith -- to Wylie in September, 1980.

On October 15, 1980, Brenda Huey observed a twin-engine airplane land on the airstrip in front of her home and disappear behind a hangar. As Mrs. Huey peered around the hangar,

she observed two men hurriedly unloading cardboard boxes from the plane into the back of a pickup truck. She heard one say, "Hurry up! Hurry up! We have to get out of here." Aroused by her suspicions, Mrs. Huey telephoned Flim Wilson, her husband's business partner, who summoned Opelika police. Upon arriving at the airstrip, a police officer saw Olson and Wylie near the airplane with airplane seats on the ground. Olson headed towards a wooded area, but returned to the officer. The officer had the two men sit near the plane until back-up units arrived.

While en route to the Huey residence, Wilson observed a suspicious-looking person, later determined to be Olson, parked alone in an Oldsmobile on the side of the road about one mile from the Huey farm. Wilson recorded the license number of the car. Before reach-

ing the Huey farm, Wilson met Wylie, his employee, with two passengers in his pickup truck. After Wylie told Wilson that his friends had landed the plane, Wilson notified police to disregard his call. The police, however, received a third dispatch from Mrs. Huey.

A few minutes after Wilson arrived at the Huey farm, Wylie drove up. This time, however, he had only one passenger, whom Wilson identified as the person he had seen in the Oldsmobile prior to his meeting with Wylie (Olson). Wylie told Wilson that he had just picked Olson up at the Mariner Inn. Wilson, however, told police that Wylie had not had time to travel the distance to the inn and back since he had last seen him.

In speaking with police, Olson mentioned repossessing the airplane but refused to

elaborate when questioned further. The officer then observed what he believed to be marijuana on the top step of the airplane. He then entered the plane and found marijuana residue on the carpet. The keys to the plane were partially covered with dirt near Olson's feet.

The craft was flown from the Huey airstrip to the Auburn-Opelika Airport where it was processed for fingerprints and marijuana residue. Police arrested David and Smith there, seized Smith's car keys, and determined that the keys fit the Oldsmobile parked outside the airport.

Prior to trial, the court denied defendants' motions to suppress evidence obtained from the airplane and the Oldsmobile, but suppressed all evidence obtained from the persons of David and Smith and from a motel room. The

court ruled that the police obtained the evidence pursuant to an arrest without probable cause.

At trial, Wylie testified that Fowler organized the smuggling operation. To corroborate Wylie's testimony, the prosecution introduced records of numerous telephone calls between Wylie and Fowler during the period of the conspiracy as well as testimony from Wylie's girl friend that Fowler called Wylie on numerous occasions. Wylie also testified that David and Smith left on the first weekend in October in the plane seized in this case, but failed to return as scheduled. Wylie, Olson, and another person waited at the Camp Hill Airport until Fowler called to say that the plane had been delayed. According to Wylie, Smith and David successfully flew the airplane into the Huey airstrip on October 15.

He saw Smith and two others unload twenty-five to thirty boxes which he was told contained marijuana into a three-quarter ton pickup truck. The two unidentified men, known to Wylie only as D.L. and J.C., drove Wylie to his pickup and then drove away. Wylie then drove David and Smith to where Olson waited in his Oldsmobile. David and Smith left in Olson's car while Olson returned with Wiley to the Huey farm where they were apprehended.

A jury convicted Olson, David, Smith, and Fowler of conspiracy to import marijuana, 21 U.S.C. § 963 (1981), importation of marijuana, 21 U.S.C. §§ 952(a) and 960(a)(1) (1981), conspiracy to possess with intent to distribute marijuana, 21 U.S.C. § 846 (1981), and possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1)(1981). The court sentenced Fowler to a total of three years; Olson,

ten years; David, five years; and Smith, five years. This appeal followed.[1]

I. Warrantless Search

We need not consider Olson's contention that the warrantless search of the aircraft is not supportable by the plain view and search incident to arrest doctrines because other grounds existed upon which to justify the search. The search of an airplane, like that of other highly mobile instrumentalities, without a warrant but based on probable cause and exigent circumstances is an exception to the warrant requirement of the fourth amendment. Carroll v. United States, 267 U.S. 132 (1925); cf. United States v. McBee, 659 F.2d 1302, 1304 (5th Cir. 1981)(automobile exception). Probable cause to search exists when the facts and circumstances available to the officers would warrant a reasonably prudent

person to believe that the vehicle contains contraband. United States v. Ballard, 600 F. 2d 1115, 1119 (5th Cir. 1979); United States v. Clark, 559 F.2d 420, 424 (5th Cir.), cert. denied, 434 U.S. 969 (1977). In determining whether probable cause exists, we look to the totality of the circumstances and the inferences which flow therefrom as well as to the collective knowledge of the police officers, rather than to the sole knowledge of the searching officer. United States v. Ballard, 600 F.2d at 1119; United States v. Clark, 559 F.2d at 424.

In this case, several facts give rise to probable cause sufficient to justify the warrantless search of the aircraft. Police had learned from Mrs. Huey that she had seen men unloading boxes from an airplane and loading them onto a pickup truck. She had also heard

one of the men say, "Hurry up! Hurry up! We have to get out of here." Wiley was seen leaving the farm with two strangers, and shortly thereafter returning with a third (Olson), whom Wilson had observed parked about a mile from the Huey residence. Further, Wilson told police that it was not plausible that Wiley could have picked Olson up at the Mariner Inn and have returned to the Huey Farm in the time Wiley indicated. Upon arriving at the craft, an officer observed Olson start walking toward the woods and then return in his direction. Police later found the keys to the craft partially buried near Olson's feet.

The existence of probable cause, and the exigencies of the situation justified a search of the plane. The suspects who had loaded the boxes onto the pickup had fled and had not been apprehended or even identified. Any evi-

dence that would have been in the plane could have been easily removed. Thus, the immediate warrantless search was proper because it was impracticable to obtain a warrant since the craft could have been quickly moved out of the area. Carroll v. United States, 267 U.S. at 153; United States v. McBee, 659 F.2d 1305.

Because exigence is determined as of the time of the initial search and seizure, it is irrelevant that police had sufficient time to obtain a warrant before the second seizure and corresponding search of the plane at the Auburn-Opelika Airport. United States v. McBee, 659 F.2d at 1305 (citing United States v. Mitchell, 538 F.2d 1230, 1232 (5th Cir. 1976)(en banc), cert. denied, 430 U.S. 945 (1977)). The exigencies and probable cause which existed at the time of the seizure at the Huey airstrip thus legitimated the subse-

quent extensive search and collection of marijuana residue from the airplane after it was flown to the Auburn-Opelika Airport where it was processed for evidence. Chambers v. Maroney, 399 U.S. 42, 52 (1970). The aircraft was located in a remote area in the late afternoon. A determination had been made to fly the plane to the Auburn-Opelika Airport before dark where there would be adequate lighting and the airplane would be secure. Although law enforcement officers had seized the craft and had it under their control, the unknown whereabouts of the other suspects created the danger, however slight, that the craft or its contents may have been moved before police obtained a valid search warrant. This procedure was reasonable and satisfied the fourth amendment.

Appellant Smith also argues that the trial

court erred in denying his motion to suppress the evidence recovered from the Oldsmobile at the Auburn-Opelika Airport. The trial court suppressed all evidence discovered as a direct result of the illegal search of Smith and David at the Auburn-Opelika Airport. The court further found, however, that the car located at the airport and evidence found therein was uncovered through information derived independently of any evidence found as a direct result of an illegal search. Smith, however, argues that the warrantless seizure of the car and the seizure of the items therein pursuant to a search warrant were direct fruits of his illegal arrest and of the illegal seizure of his car keys. We reject this contention on the grounds that: (1) the discovery of the automobile had an independent source from the illegally seized keys, and (2) the

automobile would otherwise have been discovered through ordinary police investigation.

The exclusionary rule bars evidence obtained "as a direct result" of an illegal search or seizure. Wong Sun v. United States, 371 U.S. 471, 485 (1963); United States v. Brookins, 614 F.2d 1037, 1041 (1980). The exclusionary rule, however, is inapplicable to evidence obtained "by means sufficiently distinguisahble [from the illegal action] to be purged of the primary taint." Wong Sun v. United States, 371 U.S. at 487-88. The three oft-cited exceptions to the exclusionary rule occur where (1) the physical evidence or witness's testimony has an attenuated link to the illegally secured evidence, Nardone v. United States, 308 U.S. 338, 341 (1939); United States v. Cruz, 581 F.2d 535, 538 (5th Cir. 1978)(en banc); (2) where the derivative

evidence has an independent source from the illegally obtained objects. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); United States v. Houltin, 566 F. 2d 1027, 1031 (5th Cir.), cert. denied, 439 U.S. 826 (1978); and (3) where the derivative evidence would inevitably have been discovered during a police investigation absent the aid of the illegally obtained evidence. United States v. Brookins, 614 F.2d at 1042.

The circumstances indicate that the evidence used to locate the Oldsmobile came from a source independent of the illegally seized keys. It is undisputed that the officers had a specific description of the Oldsmobile viewed by Wilson as well as the car's tag number and that a look-out had been posted on the vehicle. This evidence constituted an independent source. United States v. McBee, 659 F.2d

at 1306; United States v. Houltin, 566 F.2d at 1031. Although the search warrant affidavit contained information regarding the illegal seizure of the keys from Smith, sufficient information in the affidavit remained to support the finding of probable cause. Therefore, the warrant was valid despite the recitation of the illegally seized evidence in the affidavit. Franks v. Delaware, 438 U.S. 154 (1978).

Similarly, the facts adduced by the prosecution indicated that police possessed and were actively pursuing leads that would have inevitably led to the discovery of the Oldsmobile and that a reasonable probability of subsequent discovery existed based on this showing and the record generally. Brookins, 614 F.2d at 1046-48. We hold that the automobile and the evidence found therein were

properly admitted under both the independent source and inevitable discovery exceptions.

II. Single versus Multiple Conspiracies

Olson argues that although the indictment charged a single conspiracy, the proof established two separate and distinct conspiracies, thus resulting in a fatal variance between the allegations and the proof. He argues that the evidence regarding the Wylie, Fowler, Stephens, and Jones conspiracy created a "spillover effect" causing a transference of guilt from these conspirators to the other defendants.

"Whether a scheme is one conspiracy or several is primarily a question for the jury." United States v. Michel, 588 F.2d 986, 995 (5th Cir.), cert. denied, 444 U.S. 825 (1979). "Personnel changes do not defeat a finding of

a single conspiracy." United States v. DeLeon, 641 F.2d 330, 334 (5th Cir. 1981); United States v. Ochoa, 609 F.2d 198, 201 (5th Cir. 1980). Rather, proof of overlapping membership in activities directed towards a common goal may reflect a single containuing conspiracy. United States v. DeLeon, 641 F.2d at 334; United States v. Tilton, 610 F.2d 302, 307 (5th Cir. 1980); United States v. Ochoa, 609 F.2d at 201.

From the evidence presented, we think that the jury reasonably could have found one conspiracy to import and distribute marijuana into the Opelika area by airplane. The evidence indicates that the conspiracy did not cease with Stephen's death, but continued when these defendants joined the conspiracy organized by Fowler. The numerous discussions between Fowler and Wylie, their presence at

meetings with Stephens, meetings with the other defendants to discuss the smuggling operation, and Wylie's presence near the aircraft evinced an overlapping membership in the various activities that reflect a single conspiracy. The fact of Stephens's death and the absence of David, Smith, and Olson from the meetings involving Fowler, Wylie and Stephens does not defeat the single conspiracy theory.

We hold that a change in the membership of the conspiracy does not mandate a finding of two separate conspiracies. Even if two conspiracies did exist, the variance between the proof at trial and the indictment will not constitute reversible error unless it affects the substantial rights of the accused. United States v. DeLeon, 641 F.2d at 336; United States v. Tilton, 610 F.2d at 307. We

find no prejudice due to the alleged variance in this case.

III. Co-conspirator Hearsay Statements

Olson argues that the court erred in admitting the hearsay conversations of Wylie, Fowler, and Stephens because these statements were not made in furtherance of the conspiracy charge as required by Fed.R.Evid. 801(d)(2)(E).[2]

We disagree. The conversations concerned the formation of future strategies and the elimination of obstacles to the scheme. "[B]ecause [the statements] set in motion transactions that were an integral part of the ... scheme," we hold that the trial court properly admitted the hearsay as in furtherance of the single continuing conspiracy in which appellants were members. United States v. Fielding, 645 F.2d 719, 726 (9th

Cir. 1981). Even if no independent proof of appellants' connection with the conspiracy existed at the time the court admitted the hearsay statements, the court protected appeallants from any prejudice by limiting the admissibility of each statement to defendant Fowler.

IV. Interim Jury Service

Olson, Smith and Fowler contend that the trial court committed reversible error in recessing the trial for five days during which period four jurors in the instant case heard a perjury prosecution tried by the government's attorney in this case. The transcript indicates that defense counsel was aware before the recess that the four jurors would be hearing the other case and that the same prosecutor would be involved. Nevertheless,

they did not object. Only the government objected to the recess, but for reasons favorable to its cause, rather than on the grounds advanced by appellants herein.[3] Appellants' failure to raise the propriety of the interim jury service at trial constitutes a waiver of this issue. United States v. Eldridge, 569 F.2d 319, 320 (5th Cir.), cert. denied, 436 U.S. 929 (1978).

V. Supplemental Voir Dire

Olson contends that to insure the impartiality of the jury, the trial court was constitutionally required to conduct a supplemental voir dire to determine whether the venire had been infected during the course of the perjury trial or by other outside influences during the interim recess. The defendants' failure to request a supplemental voir

dire or call the court's attention to this matter in any manner at trial waived the issue. United States v. Eldridge, 569 F.2d at 320. The cases upon which appellant relies do not require the trial court to conduct supplemental voir dire on its own motion where the defendant neglects to timely raise the issue of interim service. Moreover, even in the presence of an objection, an obligation to conduct supplemental voir dire arises only after a "significant" delay. See United States v. Price, 573 F.2d 356, 365 (5th Cir. 1978)(where defendant objected to interim service, trial court committed reversible error by failing to conduct supplemental voir dire after delays of forty-three and forty-nine days between jury selection and commencement of trial). The requisite delay is absent from this case.

VI. Judicial Interference

Olson contends that the trial court improperly injected itself into the trial to such an extent as to deny defendants a fair trial. Appellants complain that the court's references to appeal could readily be understood by the jury to mean that the court presumed that the defendants would be convicted and therefore appeal to this court. Of these remarks, we only find objectionable the court's statement "I can just imagine trying to send the record to New Orleans, and including that tank."

Although the jury could have interpreted this statement according to the meaning advanced by appellant, we hold that the comment does not constitute reversible error. This reference "occupied but a few seconds of a lengthy trial," and was made in the context of the court's ruling on procedural matters. We also believe that the jury understood the comment to mean

that counsel would pursue this matter with the court of appeals if his client was convicted and appealed. United States v. James, 510 F.2d 546, 550 (5th Cir.), cert. denied, 423 U.S. 855 (1975). Even if the trial court's comment may have influenced the jury, we believe that the instruction to disregard the statements of counsel and the court except for its charge as to the law overcame any possible prejudice. United States v. James, 510 F.2d at 550-51. The court's comments did not suggest that the jury's decision would not be final and that the ultimate decision rested with an appellate court. United States v. Day, 438 F.2d 121, 122 (5th Cir. 1971).

Olson also argues that the court commented on the accused's refusal to testify and thereby committed reversible error in the

following exchange with defense counsel:

Counsel: Your Honor, for the record, my client has asked me to inform the Court and the Jury that he is convinced that Mr. --

Prosecutor: We object, Your Honor.

The Court: No, I don't think we had better say that. You let your client testify, if you want to, about whatever you want to testify for him.

Defense Counsel: All right.

We hold that this did not constitute a comment on defendant's failure to testify, but rather reflected his right to take the stand and testify under oath if he so desired. Even if the court's admonition could be interpeted [sic] as a comment on appellant's failure to testify, we hold such error harmless. Cf. United States v. Lepiscopo, 429 F.2d 258, 260

(5th Cir.), cert. denied, 400 U.S. 948 (1970) (court's statement to pro se defendant not to make side comments to jury while cross-examining witness and that he would have opportunity to be sworn and testify if he so chose did not constitute comment on defendant's failure to testify).

We find appellant's other contentions regarding the court's alleged overinvolvement in conducting the trial to be without merit.

VII. Prosecutorial Comments

Smith complains that several prosecutorial comments were so prejudicial as to constitute plain error. During closing argument, the prosecutor stated that defendants "schemed to bring in thousands of pounds or more of marijuana ... to any child that would smoke it." After the court sustained objection and ad-

monished the prosecutor that no evidence existed that marijuana went to any child, the prosecutor resumed this line of argument by stating "And I don't care whether it was a man, woman, or a child. ... They said you can't believe Wiley when the lives and destinies of people are at stake. How about the lives and destinies of people who smoke the marijuana?" Again objection was sustained and the jury told that the laws were made by Congress and the jury was not to be concerned about the purpose of the law, but only with whether or not the law had been violated.

The attempt to discredit the appellants by alluding to the general problem of drug abuse in the community presents the danger of implicating the appellants in offenses other than those charged. The prompt objections and the court's immediate instructions, however,

prevent a finding that the improper suggestions of a drug problem in the populous and of the effect of narcotics on human lives invalidates these convictions. United States v. Leaman, 546 F.2d 148 (5th Cir.), cert. denied, 431 U.S. 917 (1977). While we admonish government counsel for injecting immaterial matters into the trial, we conclude that the comments did not irreparably affect the jury's deliberations so as to prejudice substantial rights of the appellants. United States v. Leaman, 546 F.2d at 151.

We hold that the prejudicial effect of other prosecutorial statements complained of constituted no more than harmless error. United States v. Corbo, 555 F.2d 1279, 1282 (5th Cir.), cert. denied, 434 U.S. 928 (1977); United States v. Leaman, 546 F.2d at 151.

VIII. Brady Materials

Appellant Fowler contends that the United States violated the mandate of Brady v. Maryland, 373 U.S. 83 (1963), which holds that the suppression by the prosecution of material evidence favorable to an accused in the sense of mitigation, exculpation, or impeachment upon request violates due process. 373 U.S. at 87; Calley v. Callaway, 519 F.2d 184, 221 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976). Fowler argues that despite defendants' request to turn over evidence favorable to them, the government suppressed a tape recording of a statement made to police by Wiley, chief witness for the prosecution, and the only witness to testify about the alleged conspiracy.

The government turned over the tape recording to the defense at the conclusion of Wiley's testimony. Defense counsel thus were

able to review the tape for approximately one hour during lunch recess before cross-examination. The court also told defense counsel that it would afford them additional time if necessary. In view of the fact that defense counsel vigorously cross-examined Wiley in regard to discrepancies between his in-court testimony and his statement given to police, we hold that the delay in disclosure did not prejudice the appellants. United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979).

Fowler also contends that the accidental erasure of portions of the police dispatch tapes violated Brady because the tapes probably included exculpatory material. In assessing whether the nondisclosure of asserted Brady information comprised a constitutional violation, the nondisclosed evidence "must be

'crucial, critical, highly significant ....'" Calley v. Callaway, 519 F.2d at 221 (citing Luna v. Beto, 395 F.2d 35, 41 (5th Cir. 1968) (Brown, C.J. concurring, joined by a majority of the court)). As the court stated in Calley:

> [W]hen Brady is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the nondisclosure to require reversal.

Calley v. Callaway, 519 F.2d at 222 (emphasis added). Appellant's speculative contentions are insufficient to bring the asserted evidence within the above cited rules to establish a violation of Brady.

IX. Rebuttal Witness

After the defense rested, the court permitted the government to reopen its case and

to introduce evidence under the guise of rebuttal. The government introduced the testimony of a Jamaican law enforcement officer to support Wiley's testimony that the plane had been in Jamaica and to rebut defense counsel's inference on cross-examination that Wiley had no personal knowledge concerning where the plane had been. David contends that the court erred in permitting this testimony because the Jamaican was not called to rebut testimony the defense had elicited, but rather to bolster the testimony of a government witness. Further, David argues that the Jamaican's testimony embraced new issues and that the appellants did not have an opportunity to explain his testimony.

Generally, it is within the sound discretion of the trial court to reopen a criminal case after both sides have rested to pre-

sent either omitted evidence or additional testimony. United States v. Wilcox, 450 F.2d 1131, 1143 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972). The record indicated that the government first learned of the Jamaican officer's identity after the first recess in the trial, but was unable to bring the witness into court until after the second recess and after the government had rested its case. Thus, the trial court did not abuse its discretion in permitting the prosecution to reopen its case because the omission was caused "through mere inadvertence." Dixon v. United States, 333 F.2d 348, 353 (5th Cir. 1964). Further, the officer's testimony concerning his observation of the plane in question in Jamaica and his in-court identification of appellants Smith and David as the plane's occupants did not raise new issues, but served

to clarify the extant issue of Wiley's personal knowledge that the plane had been held up in Jamaica and that David was the pilot.

X. Jury Instructions

Appellant David complains that the court's supplemental jury instruction constituted reversible error by failing to conform to the facts. The charge explained the concept of aiding and abetting through an example involving murder in the sale of a weapon. David argues that the murder example was extremely prejudicial because the jury "would be bound to infer negative things about a defendant in a case where the judge relates murder and weapons to the case at hand."[4] As a preface to this charge the court also stated:

> [T]hese charges that I will recharge you on are to be considered in the

> light of all of the other charges that I have given you, and you should not overemphasize these charges nor should you assume that I believe either that Fowler or Olson is guilty or is not guilty of either one of those counts. I don't mean to imply that I think that they are or they are not, or that the government has failed to establish proper proof of that fact. All I am doing is stating the law to you. And if you have asked a particular question, and I seek to give you a particular answer, not with the idea of telling you what to do in your deliberations, but with the idea of telling you the law on the subject. [Emphasis added.]

In giving additional instructions in response to inquiries from the jury, the court should be careful to give a balanced charge. If the court

> [E]lects not to repeat the entire original charge, he should remind the jury of the burden and quantum of proof and presumption of innonence or remind them that all instructions must be considered as a whole or take other appropriate steps to avoid any possibility of prejudice to the defendant.

United States v. Sutherland, 428 F.2d 1152, 1158 (5th Cir. 1970), cert. denied, 409 U.S. 1078 (1972)(emphasis added).

We find that the disputed instruction clearly met the mandate of Sutherland. We further hold that because the issue of accomplice liability clearly was implicated in this case, appellant's contention that the instruction was irrelevant, one-sided, and without basis in the law was without merit.

Because the Jamaican officer never testified that the appellants had committed an illegal act in Jamaica, David also argues that the following instruction constituted prejudicial error:

> Now, Ladies and Gentlemen, then bear in mind that any illegal act committed by anybody flying an airplane in Jamaica is not evidence of any illegal act that we are concerned with in this case. And you should not imply that some illegal

> act was committed in Jamaica in regard to a traffic pattern of an aircraft, or whatever it may turn out to be, that anybody has imported marijuana.
>
> The purpose of this testimony is simply to let you have the testimony to the extent that it may bear on some of the issues in this case.

David posits that this instruction forced defense counsel to elicit on cross-examination of the officer that he took note of the plane because of a landing violation.

We find that the trial court did not abuse its discretion in giving the above charge because the facts were susceptible of the interpretation that, because the Jamaican officer approached the appellants, they had committed some illegal act. Thus, the instruction was meant to ensure that the jury did not find the appellants guilty of import-

ing marijuana because the officer approached them. The charge neither allowed the jury to convict appellants on a charge separate from those stated in the indictment nor reduced the government's burden of proof. United States v. Walker, 621 F.2d 163 (5th Cir. 1980), cert. denied, 68 L.Ed.2d 202 (1981). We therefore do not find the charge prejudicial.

XI. Sufficiency of the Evidence

Appellants Fowler, Smith, and David also challenge the sufficiency of the evidence on all four counts. The government presented Wiley's testimony to show each appellants' membership in the conspiracy to import and the conspiracy to possess as well as to prove the substantive counts of importation and possession. Appellants, however, contend that Wiley's testimony was not credible.

An appellate court may not assess the

credibility of witnesses; that function is relegated to the jury. United States v. Parker, 586 F.2d 422, 429 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979). Rather, the standard on appellate review as to sufficiency of the evidence requires us to inquire as to whether the jury could have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence. United States v. Moreno, 649 F.2d 309, 312 (5th Cir. 1981). In applying the standards of review, we must consider the evidence and all reasonable inferences therefrom in the light most favorable to the government. Glasser v. United States, 315 U.S. 60 (1942). Evidence is thus sufficient to support a conviction when a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the appellant's

guilt beyond a reasonable doubt. United States v. Restrepo-Granda, 575 F.2d 524, 527 (5th Cir.), cert. denied, 439 U.S. 935 (1978).

After reviewing the evidence, we have determined that Wiley's testimony was substantial to support appellants' convictions on both conspiracy counts as well as on both substantive counts. The uncorroborated testimony of a co-conspirator is sufficient to support a conviction if the testimony is not incredible or unsubstantial on its face. United States v. Trevino, 565 F.2d 1317, 1319 (5th Cir.), cert. denied, 435 U.S. 971 (1978); United States v. Morgan, 562 F.2d 1001, 1003 (5th Cir. 1977), cert. denied, 434 U.S. 1050 (1978).

Defendants also contend that the approximately .15 gram of marijuana found on the airplane was insufficient evidence to support the

charge of possession with intent to distribute. United States v. Greyson, 625 F.2d 66, (5th Cir. 1980). Although Wiley admitted that he did not see the contents of the boxes, the large quantity of marijuana necessary to support the inference of possession with intent to distribute was established through the testimony of Wiley and Mrs. Huey regarding the twenty-five to thirty boxes being removed from the airplane and onto a pickup truck. Based upon his discussions with the other conspirators, Wiley was also aware of what the boxes were supposed to contain. Thus, we conclude that the jury was justified in finding beyond a reasonable doubt that the boxes contained marijuana and that the conspirators intended to distribute the marijuana.

CONCLUSION

For the reasons delineated above, we

hold that the trial court did not commit reversible error. Appellant's convictions are therefore affirmed.

AFFIRMED

FOOTNOTES

1. Smith, David, and Fowler adopt by reference all applicable issues and arguments raised by the other appellants in this consolidated appeal. Fed.R.App. P 28(i).

2. Fed.R.Evid. 801(d)(2)(E) provides, in pertinent part:

   A statement is not hearsay if -

   The statement is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

3. The prosecution objected that the recess would extremely prejudice its case by forcing four jurors to hear a "completely different" case in the interim "and then expect them to come back and remember what they have heard here." The United States attorney added "[i]t is totally unfair to ... both sides, actually." Appellants, however, argue on appeal that the interim jury service may have affected the jurors' impartiality because the prosecutor's participation in both cases rendered the cases similar.

4. In response to the jury's request to explain the meaning of aiding and abetting the court stated, in pertinent part:

[T]he guilt of an accused in a criminal prosecution may - and I emphasize may because it is up to you to decide about it - may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through direction of another person as his agent or by acting in concert with or under the direction of another person or persons in a joint effort or enterprise.

Now I am going to give you an example. Let's assume that I am a murderer and want to murder somebody, but I don't want to bloody my hands or I don't want to take the chance that I might be caught. So what I did is hire somebody else to do it. And I pay somebody a thousand dollars to kill this person. Now, I haven't turned a hand to kill anybody. I abhor violence. I wouldn't do a thing like that, but I am a rascal enough to hire somebody else to do it. Under this law, I am just as guilty as the man that pulls the trigger or pushes the knife because the law provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures it commission is punishable as a principal....

....

Getting back to the murder situation: A man comes to me and he wants a pistol, and I have got a pistol, and I let him have my pistol. I don't know what he wants with it, and I think ... I have a right to assume he wants it for a legal purpose. And he takes that pistol and he goes and shoots somebody. Now, I would not be guilty of murder if I did not have reason to know that he wanted that pistol for an illegal purpose. But if I know that that man wants that pistol for an illegal purpose, then I am aiding and abetting him in doing the illegal act of murder, and I am as guilty as he is. Now, that is the law.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7148
Non-Argument Calendar

D.C. Docket No. CR80-33-E

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JULIUS CECIL OLSON,
RONALD EDWARD SMITH,
WILLIAM LARRY DAVID,
DAN FOWLER,

Defendants-Appellants.

Appeal from the United States District Court
for the
Middle District of Alabama

Before HILL, VANCE and HATCHETT,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of the said District Court in this cause be, and the same are hereby affirmed.

February 19, 1982

ISSUED AS MANDATE: April 8, 1982, as to Olson, Smith and David

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7148

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM LARRY DAVID,
DAN FOWLER, JULIUS CECIL OLSON,
and RONALD EDWARD SMITH,

Defendants-Appellants.

Appeal from the United States District Court
for the
Middle District of Alabama

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion February 19, 11 Cir., 1982, ___F.2d__).
(Mar 25 1982)

Before

PER CURIAM

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2324

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD EDWARD SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a warrantless search of an airplane violated the Fourth Amendment.

2. Whether the district court correctly admitted certain evidence obtained from a source independent of the illegal arrest and search of petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2324

RONALD EDWARD SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A47) is reported at 670 F.2d 185.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1982. A petition for rehearing was denied on March 25, 1982. On May 18, 1982, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 9, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner and three co-defendants, Julius Olson, William David, and Dan Fowler, were convicted of conspiracy to import marijuana,

in violation of 21 U.S.C. 963 (Count 1), importation of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1) (Count 2), conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 3), and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 4). Petitioner was sentenced to five years' imprisonment on each count, with the terms of imprisonment on Counts 2 and 4 to be followed by special parole terms of two years. The sentences on Counts 2 through 4 were to run concurrently with one another, but consecutive to that imposed on Count 1.

The facts, which are not in dispute, are summarized in the opinion of the court of appeals (Pet. App. A2-A8). On October 15, 1980, Brenda Huey observed a twin-engine airplane land on the airstrip at the Huey farm near Opelika, Alabama (Tr. 51).[1] Mrs. Huey went to investigate, and, as she peered around a hangar, she saw two men hurriedly unloading boxes from the airplane into a pickup truck. She heard one of the men say: "Hurry up! Hurry up! We have to get out of here" (Tr. 52-54). Because this conduct aroused her suspicions, Mrs. Huey telephoned her husband's office and talked with his business partner, Flim Wilson, about what she had just seen (Tr. 55). Wilson called the police and then drove out to the Huey farm (Tr. 120-121).

On his way to the Huey residence, Wilson noticed a person, whom he later identified as co-defendant Olson, sitting alone in an Oldsmobile on the side of the road next to Bishop's Grocery, less than a mile from the Huey farm. Wilson wrote down the license plate number of the car and continued toward the farm (Tr. 121-124). Before reaching the farm, Wilson met Sam Wiley, an employee of his, driving a red pickup truck. Two other men were riding with

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[1] "Tr." refers to the trial transcript; "H. Tr." refers to the transcript of the suppression hearing.

Wiley in the truck. Wilson asked Wiley if he had been at the airstrip, and, when Wiley said yes, Wilson told him he had called the police and would call back to tell them it was a false alarm (Tr. 145). Wilson then went on to the farm, where he telephoned the police and told them to disregard his previous call (Tr. 126, 145-146). A few minutes after Wilson arrived at the farm, Wiley drove up. This time, however, he was accompanied by Olson—whom Wilson had just seen in the Oldsmobile before first encountering Wiley (Tr. 126-127). Wiley and Olson left again and went in the direction of the airstrip (Tr. 127).

Mrs. Huey had called the police herself, however, and Officer Sumners of the Opelika Police Department arrived at the farm. He spoke with Mrs. Huey and Wilson and then went to the airstrip (Tr. 80, 187-189). There he found Wiley and Olson standing at the door of the airplane; three airplane seats were on the ground outside the plane (Tr. 189-190). Wiley explained to Wilson that he had just picked Olson up at the Mariner Inn, but Wilson informed the police that this statement was almost surely false because Wiley had not had time to travel that distance (see Pet. App. A5). Other police officers were called and arrived shortly thereafter. One officer noticed some marijuana residue on the top step of the airplane. He entered the plane and found more marijuana residue inside the aircraft (Tr. 234, 303-304). Apart from the marijuana, other items found inside the airplane linked petitioner to the aircraft and were introduced as evidence at trial (Tr. 305, 397). The keys to the airplane were found partially covered with dirt near Olson's feet (Tr. 267-268, 306).

The airplane was flown from the Huey residence to the Auburn-Opelika airport later that afternoon by a charter pilot, who was approached by two men asking to be flown to Monroe, Georgia (Tr. 498-511). The police questioned

the two men, later identified as petitioner and Larry David, and arrested them. Car keys seized from petitioner were found to fit an Oldsmobile parked outside the airport—the same Oldsmobile that Wilson had earlier seen and whose description and license number he had given to police (H. Tr. 134-146, 150; Tr. 779). The Oldsmobile was seized by the police and later searched pursuant to a search warrant.

Prior to trial, the district court denied the defendants' motions to suppress evidence from the airplane and the car, but suppressed all evidence seized from the persons of David and petitioner on the ground that there was no probable cause to support their arrest (see Pet. App. A6-A7). The court of appeals affirmed (*id.* at A1-A47). The court held that the officers had probable cause to search the airplane and that exigent circumstances justified a warrantless search (*id.* at A9-A13). The court also rejected petitioner's contention that the search of the car was a fruit of petitioner's illegal arrest, explaining that the search of the car derived from an independent source (*id.* at A14-A17) and, moreover, that other leads that the police were pursuing would inevitably have led to the search of the car (*id.* at A17).

ARGUMENT

1. Petitioner contends (Pet. 17-38) that the court of appeals erred in upholding the warrantless search of the aircraft. He apparently concedes that probable cause for the search did exist (Pet. 22),[2] but argues that because the

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[2]The court of appeals relied on several facts in concluding that there was probable cause: Mrs. Huey had seen two men unloading boxes from the plane, obviously in a hurry; Wiley was seen driving away from the farm with two strangers and returning with a third, who had been seen parked nearby; Wiley told Wilson an implausible story about where he had picked up Olson; when Officer Sumners arrived at the airstrip Olson first began walking away towards the woods before returning to speak with the policeman (see Pet. App. A10-A11).

airplane was surrounded by a number of police officers who had Olson and Wiley in custody, the government failed to show that exigent circumstances made it impracticable to obtain a warrant. This argument is without merit.

a. First, the court of appeals correctly found that there were exigent circumstances here that justified an immediate search (see Pet. App. A10-A12). The plane had landed recently and obviously was highly mobile. Petitioner notes that two co-defendants were in custody at the time of the search and thus did not reasonably have access to the airplane. But, as the court of appeals noted (*id.* at A11-A12), the two suspects who had been seen loading the boxes onto the pickup truck had fled and had not even been identified. Thus, there remained a danger that evidence in the airplane could have been removed or destroyed or the plane itself moved away.[3]

This case is therefore distinguishable from *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), on which petitioner heavily relies (see Pet. 19-31). There the defendant had been aware of the ongoing investigation for some time and had already had ample opportunity to destroy any evidence in the car of which he was aware. The car was parked as usual in the driveway of his house, and there was no suggestion that the car had been used for any illegal purpose on the night in question. After the defendant was arrested, there were no other confederates at large, nor were the police

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[3]Petitioner errs in his assertion (Pet. 28-30) that any power to search the airplane without a warrant would have been extinguished once several officers had arrived at the airstrip and surrounded the plane. It is well established that, if the police have the right to conduct a search of an automobile when it is first seized, they are still permitted to conduct a warrantless search on the basis of probable cause after it has been secured. *Colorado* v. *Bannister*, 449 U.S. 1, 3 (1980); *Texas* v. *White*, 423 U.S. 67, 68 (1975); *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970). The same principle applies here.

searching for contraband or stolen or dangerous items. Under those circumstances, the *Coolidge* plurality concluded that there were no exigent circumstances that made it impracticable to secure a warrant. 403 U.S. at 460-462.[4]

b. In any event, this Court has made clear in recent years that the "automobile exception," which petitioner concedes (Pet. 19) is fully applicable here to an airplane, does not depend on any special exigent circumstances. See generally *United States* v. *Ross*, No. 80-2209 (June 1, 1982), slip op. 8-10. See also *United States* v. *Martin*, No. 81-5132 (4th Cir. Oct. 6, 1982), slip op. 9-11. Rather, the reasons that a search of an automobile is permitted without a warrant are inherent in its nature:(1) its mobility (see, e.g., *Chambers* v. *Maroney, supra*, 399 U.S. at 51) and (2) the owner's diminished expectation of privacy in a car that travels on public thoroughfares with its contents exposed to plain view (see *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)).[5] While an airplane is not exposed to public

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[4]The court of appeals cases relied on by petitioner (Pet. 31-37) are similarly distinguishable. In *United States* v. *Fogelman*, 586 F.2d 337, 342-343 (5th Cir. 1978), the court found no exigent circumstances because the car had been parked for some time and the only two suspects were in custody. In *United States* v. *Kelly*, 547 F.2d 82, 84 (8th Cir. 1977), the defendant had been arrested, the car was unoccupied and parked on private property, and there was no indication of a friend or confederate still at large who might have been able to move the car. And in *United States* v. *Payne*, 429 F.2d 169, 172 (9th Cir. 1970), the defendant, who was seen with illegal drugs at a campsite, was clearly in the process of bedding down for the evening; there was no reason to think that he or any of his party was preparing to leave.

[5]The plurality opinion in *Coolidge* v. *New Hampshire, supra*, is not to the contrary. In addition to the special circumstances in *Coolidge* described above, the owner there was deemed not to have a diminished expectation of privacy in the car because it was parked in his private driveway, i.e., within the "curtilage" of the residence. 403 U.S. at 460.

view in the same way as a car when it is in transit, it is still open to public view when it is parked at a public airport or, as here, on the Huey farm. Thus, the warrantless search of the plane did not violate the Fourth Amendment.

2. Petitioner contends that the search of the Oldsmobile at the airport was a fruit of his illegal arrest because the car keys were seized pursuant to a search incident to that arrest. The district court correctly ruled, however, that the car and the evidence found therein were uncovered through information derived independently of any illegally seized evidence.[6] The court of appeals' affirmance of this ruling does not warrant review by this Court.

Petitioner states at the outset (Pet. 39-42) that the court of appeals failed to address his contention that there was no probable cause to search the car. In fact, the court of appeals specifically found that the affidavit supporting the warrant to search the car contained "sufficient information * * * [apart from the illegal seizure of the keys] to support the finding of probable cause" (Pet. App. A17). This conclusion was correct. The police knew that Olson had been seen sitting in the car near the Huey farm. Shortly thereafter, Wiley brought Olson to the aircraft and apparently lied about where he had picked up Olson. Marijuana was found in the plane, the keys to which were found at Olson's feet. Clearly, there was probable cause to believe that Olson was connected with the drugs in the plane and therefore that the car that Olson had been using that day could contain evidence of the crime.

Petitioner briefly contends (Pet. 43-44) that the court of appeals erred in its ruling that the search of the car was not a fruit of the illegal arrest because sufficient basis for the

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[6]The district court did suppress all evidence taken from the person of petitioner and of David, including the car keys and a motel room key, as well as evidence obtained from the motel room (Pet. App. A6).

search was derived from an independent source; he argues that the location of the car was unknown and that it was only the illegal seizure of the car keys that led the police to the car. The evidence does not demonstrate, however, that the discovery of the car was a fruit of the seizure of the keys. It is undisputed that the police already had a specific description of the Oldsmobile and its license number and that they were looking for the car (see Pet. App. A16). The airport where the airplane under suspicion was met was obviously a focus of that search. Indeed, an officer who was not involved in the illegal arrest testified that he had already located the car in question parked in front of the airport's entrance before being given the keys (Tr. 779; see H. Tr. 151). Thus, the court's finding of an independent source is soundly based in the record, and that fact-bound conclusion, concurred in by two courts below, does not merit further review. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[7]

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[7]Petitioner also seeks review of the court's holding that the inevitable discovery doctrine requires admission of the evidence seized from the car (see Pet. 44-56). As noted above, the police were already looking for the car in question, of which they had a full description, and the court of appeals' conclusion that the automobile would have been discovered, apart from the illegal seizure, is correct. Petitioner correctly notes (Pet. 52-56) that the circuits are not in accord on the application of the inevitable discovery doctrine, although the Court has nonetheless declined to review that issue in the past. See, e.g., *Fitzpatrick* v. *New York*, 414 U.S. 1050 (1974). In any event, there is no occasion to review it here. The court below invoked the inevitable discovery doctrine only as an alternative holding; the primary basis for its decision was its holding, discussed above, that the discovery of the car was not a fruit of the illegal arrest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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